STATE OF MICHIGAN

COURT OF APPEALS

LENARD A. KOZMA, d/b/a LENARD A. KOZMA CONSTRUCTION,

Plaintiff-Appellant,

v

CHELSEA LUMBER CO., ROBERT ASHBY, DARRELL WILLIAMS, JEFF EDER, JASON JANESKI, CREEKSIDE CONSTRUCTION LLC,

Defendants-Appellees.

UNPUBLISHED
July 20, 2010

No. 290713
Washtenaw Circuit Court
LC No. 07-000987-CZ

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10) in this action, which was brought in both tort and contract law. We affirm in part, reverse in part and remand for further proceedings.

On appeal, plaintiff asserts that the trial court erred in dismissing each of the counts that appeared in his complaint. The trial court's grant of summary disposition occurred after the court concluded that plaintiff failed to demonstrate that a meeting of the minds occurred in relation to the alleged contractual agreement with Chelsea Lumber Company ("Chelsea"). The trial court then determined that all of the other counts in the complaint were derivative of the breach of contract claim and that those counts failed as a consequence of the lack of a valid contract. We agree in part that the trial court's ruling was in error.

Defendants motions for summary disposition were filed pursuant to MCR 2.116(C)(8) and (C)(10). In granting the motions, the trial court failed to specify which subrule it was basing its decision on. This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997). Likeiwse, a grant of summary disposition pursuant to MCR 2.116(C)(8) is also reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Where summary disposition is sought pursuant to MCR 2.116(C)(8), "the motion tests whether the complaint states a claim as a matter of law, and the motion should be

granted if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). This case also presents issues relating to the existence and meaning of an alleged contract. , "[t]he existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Finally, we note that to the extent that this Court determines that the trial court reached the proper outcome but that its reasoning was flawed, it is well-established that in such instances, it is unnecessary to reverse the trial court's holding. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Plaintiff's complaint included nine separate counts, which were brought against a combination of six different defendants. For organizational purposes, this opinion will address each of plaintiff's counts in turn.

BREACH OF CONTRACT

To maintain a cause of action for breach of contract, a party must establish the existence of a contract and then must demonstrate that the contract was breached. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). "The essential elements of a valid contract are the following: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

In the present case, the trial court determined that a valid contract did not exist because there was no mutuality of agreement. As our Supreme Court has stated, "a fundamental tenet of all contracts is the existence of mutual assent or a meeting of the minds on all essential terms of a contract." *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004). "'A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.'" *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App. 543, 548; 487 NW2d 499 (1992) (citations omitted). In the context of an alleged employment contract, the Supreme Court has provided direction regarding the element of mutuality. The Court "recognized 'the difficulty in verifying oral promises,' especially in the employment relations context, because individuals often harbor 'optimistic hope of a long relationship' that causes them to misinterpret their employer's oral statements as manifestations of an intention to undertake a commitment in the form of a promise of job security.' *Rood v General Dynamic Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993) (internal citation omitted), quoting *Rowe v Montgomery Ward & Co*, 437 Mich 627, 640; 473 NW2d 268 (1991). Consequently, the Court in *Rowe* stated that, "oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will." *Rowe*, 437 Mich at 645.

We conclude that summary disposition was properly granted in favor of defendants because plaintiff has failed to demonstrate that Chelsea did not have the authority under the alleged agreement to terminate the agreement at will. As the trial court concluded, plaintiff cannot establish the existence of a mutuality of agreement. Specifically, the evidence does not demonstrate that the parties to the alleged agreement reached a mutual understanding regarding the length of their agreement and the manner in which that agreement could be terminated.

Although plaintiff's complaint alleged that the agreement was renewable on a year-to-year basis, plaintiff's deposition testimony demonstrates otherwise. Plaintiff's testimony indicated that the contract was not renewed on a yearly basis, but was perpetual from the moment it was reached. When asked whether Chelsea could terminate the agreement whenever it desired, plaintiff initially stated that Chelsea's owner could do whatever he wished. However, he later changed his testimony and stated that Chelsea could not terminate him, that the agreement was never-ending and that the parties never discussed the concept of termination. Plaintiff's deposition testimony displays that he himself does not have an understanding of the essential terms of the agreement. Furthermore, plaintiff improperly relies on the testimony of Thomas Knapp. While Knapp's testimony did provide evidence that an agreement existed between plaintiff and Chelsea, the testimony did not speak to whether that agreement could be terminated at will. Where plaintiff lacks knowledge regarding the terms of the contract, and where there is no documentary evidence or testimony in support of plaintiff's argument, it would be improper to conclude Chelsea clearly and unequivocally offered plaintiff the lifetime position of exclusive garage builder.

Although the trial court correctly included that the parties did not reach a mutual agreement relating to the length of the contract, the trial court erroneously concluded that the lack of mutuality regarding certain terms was fatal to the agreement as a whole. Our Supreme Court has established that the length of a contract and the manner of terminating a contract are not essential terms of a contract and that those terms may be judicially constructed. According to the Court, when a contract is silent regarding *both* its length and the manner of termination, it is implied that the contract is terminable at will. *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 236; 324 NW2d 732 (1982). Because this agreement was terminable at will, plaintiff's breach of contract claim necessarily fails as it is premised on the theory that Chelsea breached the agreement when it ceased to send him garage referrals. Consequently, summary disposition was proper in favor of all defendants pursuant to MCR 2.116(C)(10).

PROMISSORY ESTOPPEL

The trial court properly granted defendants motion for summary disposition regarding plaintiff's promissory estoppel count. As this Court has stated:

> The elements of promissory estoppel are "(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." [*Ardt v Titan Ins Co*, 233 Mich App 685, 692; 593 NW2d 215 (1999), quoting *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 589; 487 NW2d 849 (1992).]

"The doctrine of promissory estoppel is cautiously applied. In order to support a claim of estoppel, a promise must be definite and clear." *Barber v SMH (US), Inc*, 202 Mich App 366, 376; 509 NW2d 791 (1993) (internal citation omitted).

As with plaintiff's claim for breach of contract, the claim of promissory estoppel is dependant on plaintiff's ability to offer evidence in support of his claim that Chelsea promised him that he would be the exclusive garage builder for as long as he desired. As with the claim of

breach of contract, plaintiff cannot satisfy that burden. The only evidence that supports plaintiff's claim is an isolated portion of his own deposition. When taken as a whole, plaintiff's deposition demonstrates that although he may have been under the impression that he was offered a lifetime position as Chelsea's garage builder, he never discussed the method of terminating that agreement. Therefore, it cannot be said that Chelsea made a definite and clear promise, per *Barber*, to endlessly supply plaintiff with garage referrals. Rather, by failing to discuss whether the agreement could be terminated, the parties' agreement was lacking in clarity from the outset. Consequently, it would be improper to utilize this cautiously-applied doctrine. Summary disposition was proper regarding each defendant pursuant to MCR 2.116(C)(10).

FRAUDULENT MISREPRESENTATION

As this Court has explained:

> To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715, 719 (2008).]

In plaintiff's complaint, he alleged that Chelsea and its defendant employees were liable for fraudulent misrepresentation because they misrepresented the amount of work that had been coming to Chelsea and falsely led plaintiff to believe that he was receiving all of the garage estimates.[1] As a result of the alleged false statements, plaintiff contends that he suffered economic damage because he continued to meet his obligations under the agreement, which presumably means that he passed up other opportunities so that he would be available to Chelsea.

According to defendants, the trial court correctly concluded that this was a derivative claim and plaintiff is not entitled to relief. Defendants contend that even if the Chelsea defendants made the alleged false statements, plaintiff's theory of damages fails. Specifically, defendants assert that plaintiff's allegation that he relied on the misrepresentation and remained committed to the agreement is without merit because the evidence demonstrates that no agreement ever existed. We disagree with defendants' assessment. As discussed in relation to the breach of contract count, plaintiff has not established mutuality of agreement relating to certain alleged elements of his agreement with Chelsea. Namely, plaintiff cannot demonstrate that Chelsea made an offer to him that was perpetual and that could not be terminated. However, the consequence of that lack of mutuality is merely the judicial construction of those particular terms. It does not automatically mean the plaintiff and Chelsea had no form of agreement or that Chelsea did not lead plaintiff to believe that there was an agreement. Rather, the evidence

[1] The fraudulent misrepresentation claim made no allegations against Jason Janeski or Creekside Construction.

certainly could cause a reasonable finder of fact to conclude that defendants made false representations to plaintiff and that plaintiff potentially was harmed when he relied on those statements.

The record in this case demonstrates that plaintiff testified that when he stopped receiving garage referrals, he contacted Chelsea and its employees and inquired about the reason. Plaintiff was told that he was not receiving any estimates because customers had not been calling Chelsea.[2] Chelsea's characterization of its business constitutes a material representation. Furthermore, the record demonstrates that customers were contacting Chelsea and that it was sending the garage referrals to Janeski. Consequently, a finder of fact would be permitted to conclude that the Chelsea defendants knowingly misrepresented a material fact with the intention of inducing plaintiff's reliance. Finally, plaintiff testified that he relied on that representation to his detriment. As a result, plaintiff has presented evidence in relation to each of the elements of a claim of fraudulent misrepresentation. To the extent that any defendants contest plaintiff's characterization of the events surrounding this claim, any such disagreement merely presents a question of credibility. Such questions are reserved for a finder of fact. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 154; 551 NW2d 132 (1996).

Because genuine issues of material fact exist regarding whether the Chelsea defendants falsely misled plaintiff with the accomplished intent of securing his reliance, it was error to grant summary disposition pursuant to MCR 2.116(C)(10). To the extent that plaintiff intended this count to apply to Janeski and Creekside Construction, summary disposition was proper pursuant to MCR 2.116(C)(10), as there is no evidence in the record regarding any of the elements of this cause of action.

INNOCENT MISREPRESENTATION

In addition the claim of fraudulent misrepresentation, plaintiff's complaint also included a count for innocent misrepresentation, which apparently only applied to the Chelsea defendants. A cause of action for innocent misrepresentation is viable when a "party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). The innocent representation must have been made in the process of creating a contract and there must be privity of contract between the plaintiff and defendants. *M & D, Inc v McConkey*, 231 Mich App 22, 28; 585 NW2d 33 (1998). It was long ago established that privity of contract "must

[2] Evidence of the exclusive nature of the alleged relationship between plaintiff and Chelsea also exists outside of plaintiff's testimony. Knapp testified that it was common knowledge that plaintiff was Chelsea's garage builder and the referrals were supposed to be sent to him. Likewise, Jeff Eder testified that when Janeski eventually stopped receiving referrals, it was because plaintiff was supposed to be getting them. The end of the relationship with Janseki apparently occurred after plaintiff approached Richard McCullough with his concerns over his lack of business.

proceed from the will of the parties to the contract." *Landwehr v Holland City State Bank*, 284 Mich 243, 251; 279 NW 497 (1938).

Because a claim of innocent representation is dependant on the existence of privity of contract, we find that summary disposition was proper in favor of Eder, Robert Ashby and Darrell Williams. Plaintiff has presented no support for his claim that there was privity of contract between himself and the individual employees of Chelsea. It was long ago established that privity of contract "must proceed from the will of the parties to the contract." *Landwehr v Holland City State Bank*, 284 Mich 243, 251; 279 NW 497 (1938). Ashby, Williams and Eder were not in privity of contract with plaintiff. Rather, those individuals were merely acting as Chelsea's agents. Plaintiff does not offer any argument or authority for the notion that those individuals ever ceased to act as agents and began to function in their individual capacities. Consequently, the trial court properly granted summary disposition pursuant to MCR 2.116(C)(10) regarding the individual defendants.

We further conclude that summary disposition was proper in favor of Chelsea pursuant to MCR 2.116(C)(8). As stated above, in an action for innocent misrepresentation, the alleged misrepresentation must have been made while the parties were in the process of creating a contract. In plaintiff's complaint, he did not explicitly describe the alleged innocent misrepresentation that forms the basis of his claim. However, the complaint provided that "plaintiff would not have *continued* in his relationship with defendant Chelsea Lumber Company if defendants had not made their representations. [Emphasis added.]" The use of the word "continued" implies that the representations were made after the contract was created. Consequently, those representations are not the proper subject of a claim for innocent misrepresentation.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The trial court did not err in granting summary disposition in favor of each defendant with respect to the intentional infliction of emotional distress claim. As this Court has explained, in order to maintain a cause of action for intentional infliction of emotional distress, a plaintiff must establish four elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). This Court has further explained that a party is only liable for intentional infliction of emotional distress when "the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id*.

In the present case, plaintiff has failed to present any evidence of extreme and outrageous conduct. Regarding the Chelsea defendants, plaintiff merely alleges that the breach of contract amounted to extreme or outrageous conduct. However, when discussing a cause of action for intentional infliction of emotional distress, this Court stated that "[i]n a contractual setting, a tort claim must be based instead on the breach of a duty distinct from the contract." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 MW2d 273 (2004). Plaintiff has not presented any evidence to demonstrate that the Chelsea defendants breached a duty to him that was distinct from the alleged contractual obligations. Consequently, he cannot establish that any outrageous conduct occurred on the part of those defendants. Summary disposition was proper in favor of the Chelsea defendants pursuant to MCR 2.116(C)(10).

Regarding the Creekside defendants, we conclude that summary disposition was proper pursuant to MCR 2.116(C)(10). Plaintiff has failed to establish that the alleged outrageous conduct caused him emotional distress. When discussing his emotional distress, plaintiff testified that he has had a very difficult time dealing with the events that occurred. He then explained that he felt betrayed by Chelsea and stated that he had known some of the Chelsea employees for a long period of time and that it was difficult to grasp what those employees had done to him. Plaintiff's description regarding why he was emotionally distressed failed to demonstrate that his distress was caused by Janeski's actions. Rather, it is clear that the source of the alleged distress was Chelsea's willingness to betray its relationship with plaintiff while receiving only minimal benefit in the form of gifts. Therefore, because the record is devoid of evidence that the Creekside defendants caused plaintiff to experience emotional distress, a reasonable finder of fact is precluded from finding in favor of plaintiff regarding this count. Summary disposition was proper in favor of the Creekside defendants pursuant to MCR 2.116(C)(10).

TORTIOUS INTERFERENCE

A cause of action for tortuous interference with a contractual relationship involves a showing of the following elements: "(1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant." *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992). This Court has further described the elements of this cause of action in the following manner:

> The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another. [*Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994) (internal quotation marks and citations omitted).]

In the present case, the trial court granted summary disposition regarding this count because it determined that the count was dependant on the validity of the alleged contract. However, *Winiemko* provides that a valid contractual agreement need not exist in order to maintain this cause of action. Therefore, the trial court's grant of summary disposition was not based on sound law.

Based on the above-cited authorities, it is clear that a party cannot be liable for tortuous interference with a contractual relationship unless that party had knowledge of the contractual relationship with which it allegedly interfered. The Creekside defendants assert that they had no knowledge of the alleged agreement. However, plaintiff has demonstrated that there is a genuine issue of material fact regarding whether the Creekside defendants had knowledge of his business relationship with Chelsea. In support of his argument, plaintiff mostly relies on the taped

conversation that he had with Janeski. In that conversation, Janeski states nothing that indicates that he was aware that plaintiff was the exclusive garage builder. Janeski merely stated that he was under the impression that plaintiff and himself were each affiliated with Chelsea and that they were each responsible for distinct geographic areas. When pressed on the issue, Janeski became hesitant to engage in further discussion. Additionally, Knapp has stated that when he had a subsequent conversation with Janeski, Janeski stated that he thought he "screwed up" because he had a conversation with "the other contractor." Had Janeski been unaware of an agreement between plaintiff and Chelsea, it is unclear why he would have felt that it was a mistake to talk to plaintiff. While Janeski can perhaps offer an explanation for his alleged statement to Knapp, a reasonable finder of fact could conclude that Janeski and Creekside had knowledge of the arrangement.

In addition to the evidence arguably demonstrating knowledge on the part of the Creekside defendants, other evidence in the record creates a genuine issue of material fact regarding whether the Creekside defendants intentionally caused Chelsea to violate that agreement. Janeski admitted that his relationship with Chelsea arose after he approached Chelsea. He further acknowledged that during the course of his relationship with Chelsea, he provided its employees with tickets to sporting events and gift certificates for restaurants. If a fact-finder concluded that the Creekside defendants were aware of the agreement with Chelsea, it could further be concluded that those defendants approached Chelsea and its employees and provided gifts in exchange for referrals that would have otherwise gone to plaintiff. Consequently, summary disposition was improperly granted to the Creekside defendants.

Although summary disposition was improper in relation to the Creekside defendants, we conclude that summary disposition was proper in favor of the Chelsea defendants. As this Court has stated, "[t]o maintain a cause of action for tortious interference, the plaintiff must establish that the defendant was a 'third party' to the contract rather than an agent of one of the parties acting within the scope of its authority as an agent." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004). As a result, plaintiff cannot maintain this cause of action against Chelsea, as Chelsea was a party to the alleged agreement. Likewise, the cause of action cannot be maintained against the individual employees of Chelsea because it has not been alleged that those individuals were acting outside the scope of their authority when they began to conduct business with Creekside and Janeski. As a result, summary disposition was proper in relation to the Chelsea defendants pursuant to MCR 2.116(C)(8).

CIVIL CONSPIRACY/CONCERT OF ACTION

As this Court has previously established, a party who fails to address an issue in its brief on appeal waives that issue as a consequence. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). Plaintiff's brief on appeal and his reply brief are utterly silent regarding whether it was proper to grant summary disposition in relation to the civil conspiracy and concert of action counts. Therefore, this Court should will address these counts and the trial court's order should is affirmed as it relates to those counts.

EXEMPLARY DAMAGES

As stated in relation to the civil conspiracy and concert of action counts, a party waives an issue when it fails to brief that issue on appeal. Plaintiff's brief is silent regarding the trial

court's dismissal of the count entitled "Exemplary Damages." Therefore, the trial court's order should be affirmed as it relates to that count. Furthermore, this Court notes that exemplary damages are a form of compensation for an injury and that they do not qualify as a cause of action.

CONCLUSION

The trial court erred in part in granting defendants' motions for summary disposition. Specifically, it was error to grant summary disposition in favor of the Chelsea defendants relating to the fraudulent misrepresentation claim. Furthermore, it was error to grant summary disposition in favor of the Creekside defendants relating to the intentional interference with a business relationship claim.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens